Editor's note: 79 I.D. 109; Appealed -- dismissed without prejudice, Civ. No. 1-72-153 (D.Idaho Apr. 3, 1973)

UNITED STATES
v.
CHARLES MAHER ET AL.
79 I.D. 109

IBLA 70-82 Decided March 21, 1972

Appeal from decision (Idaho 1-68-1 et al.) by Office of Appeals and Hearings, Bureau of Land Management, affirming hearing examiner's decision as modified.

Affirmed as modified.

Administrative Procedure: Adjudication--Administrative Procedure: Generally--Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Apportionment of Federal Range

A decision of a district manager which is arbitrary or capricious will not be sustained, when challenged by one who has standing, even in the absence of any evidence of serious economic impact. To that extent, National Livestock Company and Zack Cox, I.G.D. 55 (1938), is overruled.

A decision involving the exercise of administrative discretion, which is supportable on any rational basis, is not arbitrary or

capricious. An apportionment of the federal range, involving some abolition of "split-use" between states and based upon the effectuation of a management plan reasonably related to the protection of forage and other values, has, therefore, a rational basis and is not arbitrary or capricious.

Grazing Permits and Licenses: Apportionment of Federal Range: Grazing Permits and Licenses: Cancellation and Reductions

Elimination of a range user's so-called "split use" between two grazing districts by consolidation of his grazing privileges in a particular grazing district is reasonably incident to formulation and implementation of grazing management programs by the Bureau of Land Management and will be permitted to stand absent severe economic impact on the parties affected thereby.

Grazing Permits and Licenses: Apportionment of Federal Range--Grazing Permits and Licenses: Appeals

The economic effect of the transfer, reduction or other change in grazing privileges of a particular range user is but one factor to be considered by the Board of Land Appeals in determining if a decision appealed from is unreasonable or should otherwise be reversed or modified.

APPEARANCES: Leon R. Weeks of Weeks & Davis for the appellants; Riley C. Nichols, Attorney, Solicitor's Office, Department of the Interior, for the appellee.

OPINION BY MR. FISHMAN

The appellants herein, Charles Maher, Carol MacIver, and L. Franklin Mader, have appealed from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated August 5, 1969, affirming with modifications the decision of a hearing examiner, dated February 20, 1969. The hearing examiner's decision dismissed appeals from a joint decision of the district managers in Vale District in Oregon, and the Boise District in Idaho, dated February 2, 1968. The hearing was held in Vale, Oregon, On July 8 and 9, 1968.

The joint decision of the district managers transferred the active grazing privileges of MacIver (231 AUMs) and Mader (970 AUMs) from Oregon to Idaho and the active grazing privileges of Maher (154 AUMs) and several others 1/ from Idaho to Oregon for the stated

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1/ As noted in the decision of the Office of Appeals and Hearings, two of the others affected by the joint decision, the Greeley Ranch and Duncan and Elaire MacKenzie, joined the other appellants in submitting a notice of intention to appeal from the hearing examiner's decision, but failed to perfect their appeal within the 30-day period prescribed in 43 CFR 1853.7(b). Greeley Ranch and Duncan and Elaire MacKenzie have not appealed the dismissal of their appeals by the Office of Appeals and Hearings.

reason of producing proper range management and the orderly administration of the federal range. In dismissing the five appeals the hearing examiner found that the appellants all have base lands in Oregon near or along the Oregon-Idaho border and that one of the reasons appellants had been allowed to exercise their grazing privileges in both the Vale District and the Boise District in the past was that prior to 1960 there was no fence along the border separating the two districts. The joint decision required the appellants to consolidate their privileges in one state, but did not reduce the number of privileges of any of the appellants.

The appeal asserts that the decisions below: (1) misconstrued the applicable law; (2) erred in determining the issue in the matter; (3) erred in the meaning of "arbitrary and capricious"; (4) made findings of fact not supported by the evidence; (5) incorporated conclusions contrary to law; (6) erred in determining that precedential administrative decisions must be followed; (7) are contrary to the facts and law; (8) failed to make findings on crucial questions of fact; (9) are arbitrary and capricious; erred in failing to find that the joint decision of the district managers was arbitrary and capricious.

The key issue 2/ before us was stipulated to by the parties at the hearing and is of the same genre as that in the National Livestock case 3/ , i.e., whether in shifting the appellants' area of use from one state to another, the district managers acted arbitrarily or capriciously or displayed a lack of good range management so as to seriously impair the appellants' operations from an economic standpoint. 4/

The hearing examiner, applying the rule of National Livestock, determined that there was no evidence in the record that the new grazing areas assigned to the respective appellants would seriously endanger the possibility of their continuance in the livestock business and render valueless their privately owned land and improvements.

2/ At the hearing, appellants' counsel, agreed to that issue but not as the sole issue. He suggested the following:

"Another of the issues is that the shift of the grazing privileges in each respective appellant's case does not take into consideration the good range management practices of both the federal range involved and the privately owned lands, and in addition, the third issue, that the reduction in federal range privileges of each respective appellant creates an excessive economic and management problem to their respective ranches, which will cause their continued operation to be prohibitive, both from a range management standpoint and economic standpoint. That a fourth issue is that the shift of the grazing privileges of the respective appellants is without due compensation. The fifth issue is that the shift of the grazing privileges of the respective ranches of the appellants deprives them of their proportionate share of the allowable carrying capacity within the respective grazing units." Tr. 13, 14.

3/ National Livestock Company and Zack Cox, I.G.D. 55 (1938).

4/ The record, Tr. 18-19, shows that appellants' attorney stated, "I would stipulate that that is the issue."

He also found that appellants failed to establish that the district managers' decision was arbitrary or capricious.

The wisdom of the National Livestock rule has been questioned, not only by appellants herein, but also by the Office of Appeals and Hearings. The rule is stated at page 60:

> Plainly, then, the determination of the particular area in which the grazing is to be permitted is a matter committed solely to the discretion of the Department, and no permittee can, as a matter of right, be heard to complain if the lands upon which he is permitted to graze are different from those which he has used in the past. Such a complaint could only be entertained upon allegation that the determination was so arbitrary or capricious as to render valueless the privately owned land and improvements of the operator adjacent to the grazing district and seriously endanger the possibility of his continuance of the livestock business. (Red Canyon Sheep Company et al. v. Ickes, decided May 27, 1938, F.(2d) 308.) [D.C. Cir.].

The Office of Appeals and Hearings, in its decision of August 5, 1969, although affirming the result reached by the hearing examiner, agreed with appellants that a decision which is arbitrary or capricious and is adverse in its effect on a licensee would be subject to reversal, National Livestock notwithstanding. Appellants correctly argue that it is not necessary to show serious economic detriment where the decision is in fact arbitrary or capricious. On the other hand, the Bureau of Land Management, while conceding that National Livestock imposes a heavy burden of proof on the

licensee by requiring him to show not only that a decision is arbitrary or capricious but also that it will render his base lands valueless and jeopardize his continuance in the livestock business, argues that such a rule is necessary to prevent the continual frustration of management programs designed to simultaneously conserve the range and achieve equitable apportionment of its use among various users.

Part of the confusion surrounding the National Livestock rule lies on its unfortunate linking of two separate and distinct concepts, i.e., the concept of "arbitrary and capricious" administrative action, with the rule "commonly recognize[d] that the right to carry on a business without illegal interference causing irreparable damage is the subject of equitable protection by injunction." Red Canyon Sheep Company v. Ickes, 98 F.2d 308, 317 (D.C. Cir. 1938).

In considering the true meaning of National Livestock it is helpful to separate these two doctrines. Initially, we note that the phrase "render valueless the privately owned land" originated in Red Canyon Sheep Co. v. Ickes, supra, which was cited in National Livestock as authority for the contested rule. In Red Canyon Sheep Co., supra, the bill of complaint filed in the United States District Court for the District of Columbia alleged as a foundation for the equitable relief sought, that the appellants' privately owned land

and improvements thereon adjacent to the grazing district would become valueless. The appellees moved to dismiss the bill upon the grounds that the appellants lacked a sufficient interest to maintain the suit in that they did not have a vested interest in the lands in question. The court found that the appellants' rights were of sufficient dignity to be entitled to equitable protection and remedies. Thus the phrase "render valueless, etc.," had relevance only as one test of whether one seeking to enforce equitable remedies in court may be successful.

In essence, in this context Red Canyon focuses on the availability of equitable relief by way of injunction. That decision does not stand for the proposition that other remedies would not be available in the absence of "irreparable damage" to the person aggrieved.

The oft-quoted National Livestock rule, if read literally, establishes a cause and effect relationship between two unrelated concepts. Thus, the rule states that the decision must be "so arbitrary or capricious as to render valueless the privately owned land, etc.," in order for the "complaint" to be entertained. This is obviously not a proper rule to govern the rights of a party seeking to obtain administrative relief from an adverse decision. Nor is it reasonable, in view of the rule's patently confused rationale, to construe it as having been

intended to set forth boundaries or restrictions as to the scope of review afforded an appellant seeking administrative review of an adverse decision. Our review is not limited to determining simply whether administrative action at the lower level is unreasonable, arbitrary or capricious. Nor are we restricted to modifying or reversing unwise or erroneous decisions only where a licensee will be put out of business.

This view is consonant with Joyce Livestock Company, 2 IBLA 322, 327 (June 2, 1971), in which we said:

> As to the effect upon the individual range user a rule has been enunciated, as pointed out by the hearing examiner, that the allocation will be upheld unless it is shown that the user's privately-owned land is rendered valueless and the possibility of its continuation in the livestock business is seriously endangered. National Livestock Company et al., supra. However, in Ball Brothers Sheep Company et al., 2 IBLA 166 (1971), a less rigorous standard was applied; i.e., that an allocation will not be disturbed where its implementation will not result in such hardship as to constitute a serious impairment of the grazing user's livestock operation. Appellant showed by testimony of Hugh Nettleton, president of the company, only that the purchase price for the Shelley properties was based upon an expectation of use in area 6-B. Nevertheless, the evidence failed to show that the privately-owned land could not be used (although not quite as intended) or that appellant's livestock operation would be seriously impaired. Thus, even the Ball Brothers Sheep Company test has not been met; a fortiori, the more difficult test of National Livestock Company has not been met.

The point need not be belabored that an administrative action which is arbitrary or capricious may be challenged successfully by one who has standing. See Shields et al. v. Utah Idaho R.R. Co., 305 U.S. 177, 185 (1938). An action in the exercise of administrative discretion may be regarded as arbitrary or capricious only where it is not supportable on any rational basis. The fact that a court reviewing a decision supported by a rational basis could have reached a contrary decision does not make the action arbitrary or capricious. Carlisle Paper Box Co. v. NLRB, 398 F.2d 1, 6 (3d Cir. 1968).

"The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body [structure of rate schedule]." Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286-287 (1934).

In the light of the foregoing, it seems clear that if an action of a district manager has a rational basis, it is not arbitrary or capricious. An action of such an official which is reasonably related to protection of the range, i.e., forage and other values or prevention of use by non-authorized parties, has a rational basis and is, therefore, not arbitrary or capricious.

But we also agree with the position of the district managers that a stringent burden of proof on the appellant is necessary to prevent frustration of beneficial range management programs. We believe this was the objective of the National Livestock principle, even though not clearly stated. It is settled law in this field that the range user has no right as a matter of law to demand that his license or permit shall confer grazing priviletes in any particular part of a grazing district. See Redd Ranches, A-30560 (July 27, 1966); Harold Babcock et al., A-30301 (June 16, 1965). His is not a vested right to the continued use of the land embraced in his permit or lease. Dr. and Mrs. A. J. Kafka, A-29807 (February 3, 1964). The burden is upon the licensee to show by substantial evidence that the decision is improper. E. L. Cord d/b/a El Jiggs Ranch, 64 I.D. 232 (1957). The determination of the range to be used is a matter entirely within the discretion of the Department. R. B. Hackler, I.G.D. 274 (1942). Yet any party affected by a decision which is arbitrary or capricious has, as a matter of right, the opportunity to obtain redress.

Therefore, to the extent that National Livestock limits the right to or scope of review in holding that "such a complaint could be entertained only upon allegation that the determination was so arbitrary or capricious as to render valueless the privately owned land . . .", that decision is overruled. On the other hand, we

agree with the language contained in the same decision to the effect that should it become necessary in the interest of good administration or in carrying out the stated purposes of the Taylor Grazing Act, 43 U.S.C. § 315 et seq. (1970), the discretion of the Bureau is of such magnitude that it would be permissible and proper even to close any given area to grazing for so long a period as might be determined to be desirable, even though a licensee or permittee were thus deprived of all grazing privileges which he previously enjoyed. So also, in an appropriate case, the Bureau may, in the reasonable exercise of its discretion, reduce or cancel the privileges formerly enjoyed by a particular licensee. Alice and L. A. Matter, I.G.D. 296 (1942); United States v. John W. Nicoll, 4 IBLA 333 (February 14, 1972).

We do not share the belief expressed by the Office of Appeals and Hearings in its decision of August 5, 1969, that a decision, even though reasonable, which renders valueless the base lands of an appellant, is necessarily in contravention of the Taylor Grazing Act. For example, upon the happening of extraordinary or catastrophic circumstances, such as fire, flood, war, drought, or pestilence, sound administration of the Taylor Grazing Act might dictate the suspension or elimination of all privileges formerly enjoyed by a licensee. See for example, H. D. Mollohan and Eagle Tail Ranch,

A-29335 (July 8, 1963). Such an event is, of course, uncommon, but it serves to illustrate the fact that the entire authority and responsibility for allocation of the federal range is vested in the Department, to be exercised in such a manner as to provide for the most beneficial use thereof. Red Canyon Sheep Co. v. Ickes, supra. What we say is simply that the economic impact on a licensee, while entitled to careful consideration, is, and always has been, but one of the factors to be weighed in determining whether a decision affecting range privileges should be affirmed, modified, or reversed.

For example, the degree of harm to one licensee or sector may be justified by the degree or benefit derived elsewhere in the public interest, or the urgency of remedying more pressing needs. The availability of acceptable alternatives to a particular transfer, reduction or change in grazing privileges may also be considered. Planning for an anticipated increase in the demands on public grazing lands may, in some instances, be of an overpowering persuasion. The specific interests of one or more grazers must inevitably be balanced against the interests of all grazers in a particular district or contiguous districts, as well as the public interest. The desirability of satisfying immediate grazing demands must be compared with the necessity for long-range planning for the benefit of future users and the public at large, including the maintenance of ecological and other environmental values.

A decision may be unreasonable, arbitrary, or capricious yet have no adverse economic effects on the licensees to whom it applies. The obverse is also true: administrative action having the most severe economic implications to a particular licensee is not necessarily the product of an abused discretion and may be permitted to stand. See A. K. Anderson et al. and E. M. Andrews, I.G.D. 578 (1952), involving a 45 percent cut in grazing privileges.

It has been, and still is, of course, a prime objective of this Department in allotting the range to cooperate with the range users in confirming the grazing privileges granted to their customary operations so far as practicable and consistent with proper range management and the interests of the qualified users as a whole in the area affected. Mrs. Lurley Holcomb et al., I.G.D. 404 (1944).

In examining the record before us, we are constrained to agree with the determination below that appellants failed to establish that the decision of the district managers was arbitrary and capricious. Nor do we find it otherwise unreasonable. At the hearing substantial evidence was received concerning the objectives to be accomplished by the transfer in question. The testimony of one of the district managers indicated that while the base properties of the appellants are located in Oregon, grazing privileges in Idaho were issued to them shortly after passage of the Taylor Grazing Act because of the natural drift into Idaho from the Oregon ranges.

Although the joint decision of the district managers does not reduce the total number of their privileges, appellants Maher and Mader testified that the consolidation could depreciate the value of their base properties. 5/ In support of their claims, Mader and MacIver presented some evidence that the forage on the Oregon side of the border is heavier than that on the Idaho side, at least in some places, but at the hearing contrary testimony was offered.

It does not appear, however, that their continuance in the livestock business is in jeopardy or that their operations will be seriously impaired. On the other hand, it appears from the record that the transfer in question will consolidate in one district or the other grazing privileges which were formerly divided between two states. By eliminating the so-called "split use" between the two districts various benefits will flow from the management program sought to be implemented, particularly, better control of an existing trespass problem. 6/ Other benefits include construction of

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5/ Appellant Carol MacIver did not testify, but requested that her case be recognized on the basis of her written appeal and the testimony of Mader.

6/ The record is something less than crystal clear on the amount of the trespassing and the identity of the trespassers (Tr. 252). However, Duncan MacKenzie conceded that he recognized the existence of the problem of trespass by unauthorized cattle on the federal range in both the Spring Mountain and French John Sub Unit (Tr. 164). The fact that the grass in the dry year of 1968 was better on the Oregon side than on the Idaho side near the end of the grazing period has some probative effect to demonstrate that the trespassing was limited, but would not necessarily negate the existence of trespass. The record clearly supports the view that "split-use", i.e., "a licensee using two adjoining pastures . . . creates a situation that lends itself to trespass" (Tr. 234). See also Tr. 235, 257, 272, and 311.

Trespass, in this context, includes grazing more than the authorized number of livestock or permitting livestock to be on the federal range on dates not embodied in the authorization.

Trespass may occur despite the absence of willfulness.

additional fencing with a planned rotation of use, better distribution of the livestock, general improvement in the utilization of the forage and administrative economy and efficiency. The prior consolidation of grazing privileges, by decreasing the number of licensees using a particular range area, permits better and more economic implementation and control of this management program.

Although appellant Maher complains that the transfer of his grazing rights was in no way connected with any current management program and is thus arbitrary or capricious, he also maintains that it was arbitrary and capricious for the Bureau to shift his privileges simply for the purpose of obtaining an overall balance of grazing privileges in the two states involved. We find these two complaints mutually inconsistent. Evidence presented by the Bureau indicated that it was necessary to transfer Maher's privileges from Idaho to Oregon to prevent an over-obligation on the Idaho side. Thus this transfer, in our opinion, is not unreasonable in view of its being an integral part of the management plan contemplated.

Appellant's contentions in their appeal to the Board are essentially those embodied in their appeal to the Director, Bureau of Land

Management. The Director's decision adequately dealt with those contentions, and to the extent the Director's decision is not inconsistent herewith, it is adopted by reference. We find sufficient evidence in the record for our conclusion that the action of the district managers, although it discommodes the appellants and may cause them some economic loss, is in consonance with desirable range management objectives and is therefore to be permitted to stand. This is not to suggest that we will not carefully consider the appropriateness of an otherwise lawful action which results in severe economic impact. In our judgment, the facts in the case at bar do not demonstrate such a severe economic impact.

In summary, we find from our review of the record that the consolidation of grazing privileges challenged here by appellants is a reasonable and necessary prerequisite to the formulation and implementation of the various range management programs envisioned by the Bureau.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081) the decision appealed from is affirmed as modified.

Frederick Fishman, Member
We concur:

Douglas E. Henriques, Member

Joseph W. Goss, Member